MBf FINANCE BERHAD (PREVIOUSLY KNOWN AS MALAYSIA BORNEO FINANCE CORPORATION (M) BERHAD) & 2 ORS.

v.

NATCOM DEVELOPMENT SDN. BHD & 5 ORS.

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[CIVIL SUIT NO D3-23-2697-89]
3 FEBRUARY 1994

PRACTICE & PROCEDURE: Plaintiffs claim based on outstanding amount owing - Plaintiffs applying for and obtaining summary judgment before SAR - Appeal against grant of summary judgment - Whether defendants had succeeded in raising any triable issues.

The plaintiffs, a consortium of financial institutions, provided finances for the development of a piece of land into a shopping complex by the defendants. The security for the grant of the finances was a debenture that covered the land and the proposed building and guarantees by the directors of the developer. On crystalization of the debenture, the Receivers & Managers sold the partially completed shopping complex and realised a sum of RM13 million.

The plaintiffs sued for the shortfall and obtained summary judgment against the defendants. The guarantors appealed contending that the sale by the Receivers & Managers was done in bad faith resulting in a sale price significantly lower than that which could have been obtained. The guarantors further contended that the Receivers & Managers were at all relevant times agents of the plaintiffs and accordingly, inspite of the exemption clauses in the debenture, they were entitled to question the amount at which the land was sold.

In the circumstances the appellants argued that their contention that the property was sold at a lesser amount than could have been obtained, provided a triable issue.

Held:

[1] The defendants have failed to provide even the semblance of a basis for the contention that there was interference, instructions or directions to the Receivers & Managers by the consortium or any of its members and it follows that the contention that the Receivers & Managers were or had become the agents of the consortium or any of its members is also without any basis.

[2] It follows that even if the Receivers & Managers had been negligent in the discharge of their duties or in any event had obtained a lesser amount than they could have obtained for the sale of the project, such negligence or omission does not provide a triable issue in the action by the consortium against the defendants.

[3] Bearing in mind the valuations of the project that have been brought to the attention of the Court, and bearing in mind that the sale was only in respect of the unsold portions of what in effect could be regarded as an abandoned or suspended project and taking into account that the sale was subject to the rights of the 66 or so subpurchasers, and the fact that the purchaser owned 23.5% of the project and any sale of it would be subject to its 23.5% interest, the contention that the sale was completed negligently or in any event at an undervalue, was without merit and did not provide a *bona fide* triable issue.

[Appeal dismissed with costs].

Cases referred to:
Gosling v. Gaskell [1897] AC 575 ***(refd)***
Thomas v. Todd [1926] 2 KB 511 ***(refd)***
Standard Chartered Bank Ltd. v. Walker [1982] 3 All ER 938 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

Other sources referred to:
Company Receivers & Managers, O'Donovan, pp. 4826, 4828

For the plaintiff - Lorraine Cheah; M/s. Shearn Delamore & Co.
For the defendants - Pawancheek bin Marican M/s. Zaitoon Othman & Associates

JUDGMENT

V.C. George J:

Tunku Yaacob Holdings Sdn. Bhd., the 2nd defendants, who owned certain lands in Alor Star, went into a project on a joint venture basis with developers called Natcom Development Sdn. Bhd., the 1st defendants, to develop the land into a shopping complex to be called Tunku Yaacob Plaza. The finances for the project were to be obtained from a consortium of financial

institutions. The completed plaza was to be shared between the owners of the land and the developers, Tunku Yaacob Holdings Sdn. Bhd. to get 23.5% of the plaza and the developers the rest. The developers were apparently entitled to and did enter into sale and purchase agreements in respect of shop lots to be built as part of the plaza with some 66 buyers.

The consortium of financiers, who are the plaintiffs, lent the required money for the joint venture on the security *inter alia* of a debenture provided by the developers that covered the said land and the building to be erected on it, and by guarantees provided by the 3rd, 4th, 5th and 6th defendants who were directors of the developers. When the project was some 80% completed the developers appeared to have run out of money and in any event work on the project came to a standstill.

On due dates moneys to be repaid to the consortium were not paid and accordingly the debenture was crystalized and Receivers & Managers were appointed who eventually sold the partially completed shopping complex to the 2nd defendants Tunku Yaacob Holdings Sdn. Bhd. on an "as-is-where-is" basis subject to the rights of the sub-purchasers and subject to the 2nd defendant's own 23.5% interest in the project. The purchase price was RM13 million which resulted in a substantial shortfall in respect of the amount owing to the consortium and hence this action against the joint venture partners and the guarantors.

The guarantors defendants had delivered a defence but the plaintiffs took out and succeeded in their O.14 application for final judgment. What is before me is the appeal from that decision by the 3rd, 4th, 5th and 6th defendants who are the guarantors.

Before me the guarantors contend that the sale by the Receivers & Managers was done in bad faith resulting in a sale price significantly lower than that which could have been obtained. They also contend that the Receivers & Managers were at all relevant times agents of the plaintiffs and accordingly inspite of the exemption clauses in the debenture, they were entitled to question the amount at which the land was sold and their contention that it was sold at a lesser amount than could have been obtained, provided a triable issue. Various other issues had been raised before the Registrar but before me Counsel for the defendants appellants, with I think ample justification, in effect rested the appeal on his submission on the said two points.

Now the Receivers & Managers were appointed on 4 January 1989. On 3 April 1989 at the instance of some other creditor the 1st defendant company was wound up. As the winding up did not affect the debenture holders priority interest in the land and the building partially erected on it, the fact of the existence of the winding up petition and the orders made as a result of it, was not an impediment to the Receivers & Managers selling the land and the partially completed building on it. However it has been contended that while it could be said that on the basis of provisions in the debenture document that the Receivers & Managers had been *ab initio* the agents of the borrower company, upon it being wound up they ceased to be such agents. For the defendants it was contended that because the consortium (or some members of it) had interfered with or had given directives in respect of the conduct of the Receivers & Managers carrying out their duties, the Receivers & Managers had become the agents of the lenders. For the plaintiffs it was contended that there had been no such interference and that there was no basis for stating otherwise and that it follows that although it is conceded that upon the winding up of the company the rRceivers & Managers ceased to be agents of the company in effect they had functioned thereafter as principals in their own right.

It is clear that once the borrower company is wound up the Receivers & Managers cease to be its agents. O'Donovan on **Company Receivers & Managers** states at p. 4828 that where the Receivers & Managers carried on the business of the borrower company with the connivance of the chargee they may become the agents of the chargee but that if they act on their own initiative without conferring with the chargee it will be difficult to establish such an agency. *Gosling v. Gaskell* [1897] AC 575 and *Thomas v. Todd* [1926] 2 KB 511 suggest that in the absence of any evidence of instructions or directions from the debenture holder the Court will be reluctant to find that the Receivers & Managers have become its

agent - see Note 8 to page 4826 of O'Donovan. In *Standard Chartered Bank Ltd. v. Walker* [1982] 3 All ER 938 Lord Denning M.R. said:

> The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care towards the company and the guarantor. If it should appear that the mortgagee or the receiver have not used reasonable care to realise the assets to the best advantage, then the mortgagor, the company, and the guarantor are entitled in equity to an allowance.

At the Order 14 stage the defendants do not have to prove anything but they have to lay an acceptable basis in support of the contentions made. For the contention that the debenture holder had interfered with or directed the Receivers & Managers in the discharge of their functions, Counsel for the appellants relied on para 3.4 of En. Abu Mansor Basir's affidavit encl.(42) in the Court file and on the letter AMB-1 referred to herein. The deponent states in para 3.4 as follows:

> 3.4. The 2nd defendant actually began negotiations with the plaintiffs before the debenture crystalised and the Receivers and Managers of the 1st defendant were appointed and before the 1st defendant was wound-up. This is evident in the letter dated 14 February 1989 written by the 2nd defendant to the Receivers and Managers of the 1st defendant. A copy of the said letter is annexed herewith and marked as Exhibit "AMB-1".

The said letter AMB-1 is a letter from Tunku Yaacob Holdings Sdn.Bhd. to the Receivers and Managers and is dated 14 February 1989. In it reference is made to a meeting of 13 February 1989 between the writer of the letter and the Receivers and Managers and "MBf" which is a reference to the 1st plaintiff, the leading financial institution in the consortium. Counsel for the defendants particularly relied on the 2nd paragraph and 3rd paragraph of that letter which are as follows:

> A first offer was made by us on 9 September 1988 for a total consideration of RM11,768,140 and after a discussion with YTM Tunku Malik, KUBB, a revised offer was made on 5 October 1988 for RM13,500,000. This was subsequently accepted by MBF in their letter of 10 November 1988.
>
> Our revised offer of RM13,500,000 was made with the intention of resuming work immediately in order to complete the first two floors of the Plaza for occupancy for the Chinese New Year and Hari Raya Puasa festive seasons. This opportunity is now lost.

What this letter shows is that Tunku Yaacob Holdings Sdn. Bhd. had, before the Receivers & Managers were appointed, made an offer to the consortium to buy up the project and that a revised version of it was accepted by the lead member of the consortium. I fail to see the relevance of that offer and acceptance to the contention that there had been interference with or directions given to the Receiver & Managers in the discharge of their functions. At that stage they had not even been appointed. For the plaintiffs it was explained that after default on the part of the borrower it was the original owner of the land, who had a 23.5% interest in the plaza who had come up with the offer. Clearly the land owner had an interest to try to mitigate the loss and trying to buy up the suspended or abandoned project was an obvious avenue available to them particularly having in mind that allowance would have to be made for their own 23.5% of the plaza. I fail to see anything sinister in the offer that had been made by Tunku Yaacob Holdings Sdn. Bhd. or in the consortium or its lead member entertaining the offer. In any event nothing came of it. The negotiations appear to have been reopened after the Receiver & Managers were appointed but there is nothing before me to even suggest that in respect of the negotiations by the Receivers & Managers with Tunku Yaacob Holdings Sdn. Bhd. for the sale of the partially completed plaza that there was interference by the consortium or by any of its members or instructions or directions given to the Receivers & Managers by them or any of them.

In my judgment the defendants have failed to provide even the semblance of a basis for the contention that there was such interference, instructions or directions and it follows that the contention that the Receivers & Managers were or had become the agents of the consortium or of any of its members is also without any basis. It follows that even if the Receivers & Managers had been negligent in the discharge of their duties or in any event had

obtained a lesser amount than they could have obtained for the sale of the project, such negligence or omission does not provide a triable issue in the action by the consortium against the defendants.

Now the said letter AMB-1 and the affidavit of Phan Foo Beam encl. (41) in the Court file show that when the original offer for the purchase by Tunku Yaacob Holdings Sdn. Bhd. of the project was made, it was subject to their own 23.5% and was made largely consistent with a C.H. Williams forced sale valuation of the unsold portions of the project as at 27 July 1988. When the negotiations came to naught the Receivers & Managers advertised for the sale of the project in the New Straits Times and in the Singapore Straits Times. They also notified all the directors of the 1st defendant (who are the guarantor defendants here) to submit any offer they may have or of any party that they could bring in. Apparently none of the defendants could or did come up with any offer and it was in that background that the Receivers & Managers had to make their counter-offer to Tunku Yaacob Holdings Sdn. Bhd. of RM 13 million. Having in mind the said valuation as at July 1988 and looking at the other valuations that have been brought to the attention of the Court, and having in mind that the sale was only in respect of the unsold portions of what in effect could be regarded as an abandoned or suspended project and was subject to the rights of the 66 or so subpurchasers, and having in mind that the purchaser owned 23.5% of the project and that any sale of it would be subject to its 23.5% interest, the contention that the sale was completed negligently or in any event at an undervalue, can be found without a trial to be without merit as I find it to be. It does not provide a *bona fide* triable issue.

The appeal has to be and is dismissed with costs.

OTHMAN BIN HAJI ABDUL HALIM

v.

HAMISAH BT AWANG

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[CIVIL APPEAL NO. 11-32-91]
20 JANUARY 1994

FAMILY LAW: Paternity suit - Application for maintenance of an illegitimate child - Appellant disclaiming paternity - Whether appellant genetically linked to the child.

EVIDENCE: Paternity suit - Determination of genetical relationship - Deoxyribonucleic Acid (DNA) test - Preconditions for test not fully satisfied - Finding of test not unqualified - Whether evidence thereof admissible.

The respondent, who claimed to have given birth to an illegitimate child as a result of an illicit liasion with the appellant, filed a maintenance suit against the appellant through the aid of the Legal Aid Bureau. The appellant denied and disclaimed paternity of the child but the Magistrate found otherwise and on 31 May 1991, ordered the appellant to pay a monthly maintenance of RM200. The appellant hence appealed.

Prior to the hearing of the appeal, both parties agreed, with the consent of the Court, to undergo a Deoxyribonucleic Acid test (DNA test) to determine the genetical relationship of the parties to the child, particularly that of the appellant, and it was agreed further that whatever the result might be, it would be binding on them both. In consequence, a DNA test was conducted on the parties, based on methods prescribed in a 1985 medical publication, by one Prof. Dr. Shaharuddin of the National University Malaysia, who, while coming out with a qualified finding pursuant to the test, had strongly suggested that a second opinion be sought elsewhere. The respondent refused to be bound by the result on the grounds that the requisite procedures for the test had not been followed and that the result was inconclusive and hence inadmissible.

Held:

[1] The DNA Profiling Analysis Report was inadmissible because it was not unqualified and all the test conditions which had been set down